Supreme Court of the United States

OCTOBER TERM 1961

No. 81

THOMAS N. GRIGGS, *Petitioner*,

v.

COUNTY OF ALLEGHENY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE, THE PORT OF SEATTLE, a municipal corporation

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To the Honorable Justices of the Supreme Court of the United States:

STATEMENT OF INTEREST OF AMICUS CURIAE, PORT OF SEATTLE, a municipal corporation

Your amicus curiae is the owner and operator of the Seattle-Tacoma International Airport constructed and maintained pursuant to the Federal Airport Act of May 13, 1946 (49 U.S.C.A. § 1101 *et seq.*) as part of a "Federal-aid airport program aimed at the establishment of a nation-wide system of public airports adequate to meet the present and future needs of civil aeronautics." 1948 U.S. Code Cong. Service, p. 1469. The interest of your amicus curiae is identical with that of respondent in respect to claims of subjacent property owners, who positioned as petitioner, seek damages against the Port

of Seattle for a "taking" of air space above their property by aircraft flying at low altitudes in taking-off and landing at the airport. The claim of said property owners involves some 250 plaintiffs whose claims run into the millions of dollars threatening the economic welfare of the Port of Seattle. The case of *United States v. Causby*, 328 U.S. 256, sometimes referred to herein as "*Causby*," followed in *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664, has established an unrealistic precedent of airport liability to nearby property owners whose property is subjected to noise and disturbance from commercial aircraft flying low over their property after taking-off or before landing at the airport. More than 200 plaintiffs have recently instituted action against the Port of Seattle upon a theory that the institution of scheduled jet aircraft service, as distinguished from propeller-driven aircraft, created a new cause of action based on a "taking," as a result of frequent low flights of jet aircraft over their property during take-offs and landings at the airport. These suits in the jet age are supported by the decision in *Highland Park, Inc. v. United States*, 161 F.Supp. 597, which decision followed *Causby*. The concern of your amicus curiae is the concern of every national airport in the United States, that if *Causby* is followed by the United States Supreme Court in the present case there would follow an unprecedented wave of litigation with an insurmountable financial burden placed upon public airports contrary to the public interest and welfare.

Your amicus curiae respectfully submits that the instant Writ of Certiorari to the Supreme Court of Pennsylvania should be denied for reasons which follow.

SUMMARY OF ARGUMENT

I.

There Can Be No "Taking" in a Constitutional Sense by a Public Airport

The declaration of a public right of flight in the navigable air space of the United States is a constitutional exercise of the power of Congress under the Commerce Clause, based on decisions of the Supreme Court giving a public easement of navigation in navigable waters. Congress having exercised that power, the property or interest that a property owner has in air space over his property is subservient to the dominant right of navigation. As a result there can be no "taking" of navigable air space in a constitutional sense. States and political subdivisions thereof cannot exercise any national right of eminent domain in navigable air space. Incidental damages for noise, vibrations and disturbances by aircraft as a result of a "taking" or exercise of power by Congress over navigable air space are non-compensable.

II.

There Was No "Taking" in a Constitutional Sense of Air Space Above the Petitioner's Property

There was no "taking" of petitioner's property in a constitutional sense. The petitioner's property is subjacent to the "approach zone" approved under the "Master Plan" by the Civil Aeronautics Administration, and hence below navigable air space used for take-off and landing of aircraft at the Greater Pittsburgh Airport. The respondent as "sponsor" under a Grant Agreement with the United States complied with all

rules and regulations of the Civil Aeronautics Administration. In doing so respondent acquired an adequate property interest for the project, and met the maximum requirements in acquiring "runway clear zones" in accordance with TSO-N-18, "Criteria for Determining Obstructions to Air Navigation." It conclusively appears that the air space above petitioner's property used by aircraft in taking off and landing at the airport was navigable air space and there was no "taking" of petitioner's property in the constitutional sense. Incidental damages for noise, vibrations and disturbance caused by aircraft using navigable air space is non-compensable as there was no physical invasion of petitioner's non-navigable air space.

III.

United States v. Causby Not Applicable

The decision of the United States Supreme Court in *United States v. Causby*, 328 U.S. 256 is not controlling for (1) the United States in *Causby* conceded there would be a "taking" under the Fifth Amendment if the land were rendered uninhabitable, (2) the decision rested on a previous decision rendered prior to declaration by Congress that air space above the United States was part of the public domain and (3) the Congress has since made clear its intent that the term "navigable air space" includes that air space needed to insure safety in take-off and landing of aircraft.

ARGUMENT

I.

There Can Be No "Taking" in a Constitutional Sense of Air Space by a Public Airport

There can be no "taking" in a constitutional sense of navigable air space.

The declaration of Congress that the navigable air space of the United States is a public easement is a valid exercise of its powers under the commerce clause. *United States v. Causby* (1946) 328 U.S. 256, 260-61, 90 L.Ed. 1206, 1209-10; *Northwest Airlines, Inc. v. Minnesota* (1944) 322 U.S. 292, 303, 88 L.Ed. 1283, 1290; *Braniff Airways, Inc. v. Nebraska State Board* (1954) 347 U.S. 590, 98 L.Ed. 967.

In *Causby, supra*, the court stated:

> "The United States relies on the Air Commerce Act of [May 20], 1926, 44 Stat. 568, c 344, 49 USCA § 171, 10A FCA title 49, § 171, as amended by the Civil Aeronautics Act of [June 23,] 1938, 52 Stat. 973 C 601, 49 USCA § 401, 10 A FCA title 49, § 401. Under those statutes the United States has 'complete and exclusive national sovereignty in the air space' over this country. 49 USCA § 176(a), 10A FCA title 49, § 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce through the navigable air space of the United States.' " (328 U.S. at 260-61)

In *Northwest Airlines, Inc. v. Minnesota, supra*, the court stated:

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." (322 U.S. at 303)

The public right of flight in the navigable air space of the United States owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in navigable waters of the United States, *regardless of the ownership of the adjacent or subjacent soil.* H.R. Rep. No. 572, 69 Cong. 1st Session, p. 10; *Braniff Airways, Inc. v. Nebraska State Board* (1954) 347 U.S. 590, 596, 98 L.Ed. 967, 975.

The title or interest of the individual or state in air and subjacent land is subservient to the public right of navigation through the navigable air space of the United States. The owner of the land and improvements thereon holds the title subject absolutely to the public right of navigation as determined by Congress. The loss of the property or interest of the state or individual in the navigable air space is non-compensable because when the United States asserts its superior authority under the commerce clause to utilize navigable air space of the United States there is no "taking" in the sense of the Fifth Amendment. For the United States has a superior navigation easement which precludes private ownership of the navigable air space. *United States v. Grand River Dam Authority* (1960) 363 U.S. 229, 231-32, 4 L.Ed.2d 1186, 1188; *United States v. Chandler-Dunbar Water Power Co.* (1913) 229 U.S. 55, 62, 57 L.Ed. 1063, 1075; *Lewis Blue Point Oyster Cultivation Co. v. Briggs* (1913) 229 U.S. 85, 87, 57 L.Ed. 1083, 1085.

The "taking" of navigable air space, being analogous to the "taking" of navigable waters for purposes and

uses of navigation and commerce, is therefore "without liability, for remote or consequential damages." *Jackson v. United States* (1913) 230 U.S. 1, 23, 57 L.Ed. 1363, 1374.

There can be no vested rights in a subjacent property owner to navigable air space above his lands for it is within the power of Congress to determine when it shall exercise its full power over the air space of the United States.

In *Gilman v. Philadelphia* (1866) 3 Wall. (US) 713, 724, 18 L.Ed. 96, 99, the court stated:

> "It is for Congress to determine when its full power shall be brought into activity, and as to the regulation and sanctions which shall be provided."

Congress having declared that the air space above the United States is part of the public domain and having proclaimed that every citizen has a right of transit through the navigable air space of the United States, precludes the states, municipalities and political subdivisions from exercising the right of public domain in respect to navigable air space.

In *Pollard v. Hagan* (1845) 3 How. (US) 212, 230, 11 L.Ed. 565, 574 (quoted with approval in *Gilman v. Philadelphia* (1866) 3 Wall. (US) 713, 726, 18 L.Ed. 93, 100, the court stated:

> "'But in the hands of the states this power [eminent domain] can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution."

The right of respondent to acquire "runway clear

zones" is not in conflict with the exercise of the power of Congress over the navigable air space of the United States because of the obligation of a sponsor to acquire "runway clear zones" involving the surface of the land (14 C.F.R. § 550.38) with a right of ingress and egress to keep the clear zone free of obstructions. 14 C.F.R. § 550.38(e)(2).

II.

There Was No "Taking" in the Constitutional Sense of Air Space Above the Petitioner's Property

The petitioner's property is about one-half mile distant from the northeast-southwest runway of the Greater Pittsburgh Airport (R. 4), and subjacent to the "approach zone" established by the Civil Aeronautics Board in respect to said runway (R. 4). The petitioner describes this "approach zone" as sloping upward at the rate of one (1) foot vertically for each forty (40) feet horizontally (R. 4). The petitioner's residence is not only below the "approach zone" but is 420 feet easterly of the projected center line of the runway (R. 32). Therefore, aircraft in taking off and landing are 420 feet westerly of petitioner's house, as takeoff and landing requires a straight line of flight.

The aforesaid approach area was in compliance with the "Rules and Regulations of the Civil Aeronautics Administration" and established with its approval (R. 32). All flights of aircraft in the approach zone above petitioner's land were regulated by the Civil Aeronautics Administration and no flights were shown to be in violation of any regulation nor to be lower than necessary for a safe landing or a safe takeoff (R. 49).

As there was no physical invasion of petitioner's air space below the approach zone but only flights through air space needed to insure safety in take-off and landing of aircraft, all flights were within the meaning of the terms "navigable air space" as defined by Congress. Federal Aviation Act, 1958, § 101(24), 49 U.S.C.A. § 1301(24).

In meeting all requirements under the Federal Airport Act pursuant to a "Master Plan" approved by the Civil Aeronautics Administration, respondent acquired an "adequate property interest" in accordance with the regulations, 14 C.F.R. § 550.38(h)(3). This included acquiring an adequate property interest in runway clear zones, 14 C.F.R. § 550.38. More particularly there was a compliance with Technical Standard Order TSO-N-18 "Criteria for Determining Obstructions to Air Navigation," 14 C.F.R. § 550.38(e)(4)(5)-(6). The "runway clear zones" are areas comprising the innermost portion of the runway approach areas as defined in TSO-N-18. See diagram on page 151, 14 C.F.R.—Aeronautics and Space (revised as of January 1, 1961) § 550.38(d)(1). Petitioner has failed to point out any obligation of the respondent to acquire any interest in land or air space other than that actually acquired by respondent for the airport proper and for the runway clear zone areas pursuant to 14 C.F.R. § 550.38. The property interest required of the sponsor by FAA is the area comprising "runway clear zones," 14 C.F.R. § 550.38.

There are no requirements under the Grant Agreement (R. 31, 32) or the Amendment to the Grant Agreement (R. 100, *et seq.*) between respondent and

the United States or required by rules or regulations which would make it necessary or authorize respondent to acquire any interest in land or air space other than set forth above. Nor has petitioner pointed out any such requirement. Likewise the respondent has complied with the law of Pennsylvania in providing "the necessary approach protection" by acquisition of property rights according to the FAA standards. The Pennsylvania Airport Zoning Act § 1563 (Petitioner's Br. 18, 42). Thus respondent has appropriated no property for public use in the constitutional sense in violation of the Constitution of the State of Pennsylvania, Art. 16, § 8 (Petitioner's Br. 38).

It conclusively appears that that part of the air space above petitioner's property and above the glide slope of the approach area which was "needed to insure safety in takeoff and landing of aircraft" at the Greater Pittsburgh Airport, was "navigable air space." 49 U.S.C.A. § 176, § 180, 14 C.F.R. § 60.17, as construed by Civil Air Regulation, Interpretation 1, 19 F.R. 4602, July 27, 1954 (14 C.F.R., revised as of January 1, 1960, pp. 1360-61); Federal Aviation Act of 1958, § 101(24), § 104, 49 U.S.C.A. § 1301, § 1304; *Antonik v. Chamberlain,* 81 Ohio App. 465, 78 N.E.(2d) 752 (1947); *Allegheny Airlines, Inc. v. Village of Cedarhurst,* 238 F.(2d) 812 (2nd Cir. 1956). The use of such air space by aircraft in taking off and landing at the airport, pursuant to the declaration of Congress under the Commerce Clause, did not constitute a "taking" in a constitutional sense. *United States v. Grand River Dam Authority* (1960) 363 U.S. 229, 232, 4 L.Ed.(2d) 1186, 1188.

There having been no invasion in a physical sense of petitioner's non-navigable air space, the incidental damages caused by aircraft flying through the navigable air space arising from noise, vibrations, disturbances and the like are not compensable. *Richards v. Washington Terminal Co.* (1914) 233 U.S. 546, 58 L.Ed. 1088, cited in *United States v. Causby* (1946) 328 U.S. 256, 262, 90 L.Ed. 1206, 1210-11. *Causby* is distinguishable in that it was found there was an invasion of the *non-navigable air space*. The exercise by Congress of its power under the Commerce Clause in respect to use and extent of use of navigable air space by analogy to navigable waters, creates an immunity against incidental and consequential damages. *Jackson v. United States* (1913) 230 U.S. 1, 23, 57 L.Ed. 1363, 1374; *Nunnally v. United States*, 239 F.(2d) 521 (4th Cir. 1956).

III.

United States v. Causby Not Applicable

United States v. Causby (1946) 328 U.S. 256, 90 L.Ed. 1206, is not applicable because (1) the United States in that case conceded there would be a "taking" in the sense of the Fifth Amendment if the flights were so low as to make the land uninhabitable, (2) the case was based on a previous decision of the Supreme Court rendered before Congress declared that air space above the United States was a part of the public domain and (3) it now appears that the intent of Congress was to include approach areas in take-off and landing of aircraft as a part of the navigable air space.

The *Causby* case was decided in 1946, and even then

may have been decided differently had not the United States on oral argument conceded there would be a "taking" under the Fifth Amendment "if the flights over respondent's property rendered it uninhabitable." The decision was based on *Portsmouth Harbor and Hotel Co. v. United States* (1922) 260 U.S. 327, 67 L.Ed. 287, a decision which arose nearly forty years ago and prior to the Air Commerce Act of 1926. This was prior to the exercise of the power of Congress declaring that all air space above the United States was part of the public domain. Both cases involved operations of the military in time of war, one missiles over a firing range, the other flights of military aircraft. This is the first time the court has been called upon to determine in peace time whether air space needed for navigation and commerce in taking off and landing at a public airport is navigable air space of the United States within the intent of Congress.

In passing the Federal Aviation Act of 1958 the definition of the term "navigable air space" was amended to include air space needed to insure safety in take-off and landing of aircraft. 1958 U.S. Code Cong. & Ad. News, p. 3751. The 1958 Act provided that all orders, determinations, rules, regulations, etc. by the Administrator of the Civil Aeronautics Authority and the Civil Aeronautics Board under any provision of law repealed and amended by the act which were previously in effect should continue in effect according to their terms until modified, terminated, superseded, set aside or repealed by the Administrator or the Board. 1958 U.S. Code Cong. & Ad. News, p. 944. One such order and determination promulgated in 1954 was the inter-

pretation by the Civil Aeronautics Board of Rule 60.17 (14 C.F.R. § 60.17) prescribing minimum safe altitudes of flight and construing the term "except when necessary for take-off or landing." The Board in its determination held "that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in a navigable air space," Civil Air Regulation Interpretation 1, 19 F.R. 4602, July 27, 1954 (14 C.F.R.—Aeronautics and Space, Rev. as of Jan. 1, 1960, at p. 1360). The courts, of course, at the time of *Causby* did not have the benefit of the official interpretation of the Civil Aeronautics Board when it dealt with the meaning of the terms "navigable air space" in reference to the then existing civil air regulations prescribing minimum altitudes of flight. That it was the intention of Congress that "navigable air space" should include that needed to insure safety in take-off and landing of aircraft now appears clear and what was said in *Causby* to the contrary is no longer applicable. Congress has now unmistakably declared that navigable air space includes *air space needed to insure take-off and landing of aircraft.* Federal Aviation Act of 1958, § 101(24), 49 U.S.C.A. § 1301(24). *The Genesee Chief* (1851) 12 How. (U.S.) 443, 456, 13 L.Ed. 1058, 1064, is authority for overruling *Causby* in the interest and advances of commerce.

It follows that *Ackerman v. Port of Seattle,* 55 Wn.(2d) 400, 348 P.(2d) 664 (1960), and *Highland Park v. United States,* 161 F.Supp. 597 (Ct. Cl. 1958), fall with *Causby. Ackerman* was not on the merits but only on declarations of the complaint. *Highland Park*

involved military jet bombers, and the United States conceded a "taking" of an avigation easement.

CONCLUSION

Navigable air space of the United States includes that air space needed to insure safety in take-off and landing of aircraft as defined in the Federal Aviation Act of 1958 and includes the "approach zone" prescribed by Technical Standard Order TSO-N-18—Criteria for Determining Obstructions to Air Navigation. The aircraft passing over petitioner's land in taking-off and landing at the Greater Pittsburgh Airport were at all times in "navigable air space" through which every citizen has a public right of transit. The petitioner is not entitled to compensation for a "taking" of the navigable air space above petitioner's land in the constitutional sense. Any depreciation of property petitioner may have suffered as from noise, vibration and other disturbance by aircraft in the use of navigable air space above his land is non-compensable. The petitioner, not being entitled to compensation for a "taking" or "damaging" of property in the constitutional sense, has not been denied due process under the Fourteenth Amendment.

Respectfully submitted,

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